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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

DAVID K. MURPHY, Plaintiff and Appellant, v. DAVID C. HANSEN et al., Defendants and Respondents.	B256441 (Los Angeles County Super. Ct. No. SC077244 c/w SC079138)

APPEAL from the judgment of the Superior Court of Los Angeles County. Gerald Rosenberg, Judge. Affirmed.

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Anker, Hymes, Schreiber, Douglas K. Schreiber; Greines, Martin, Stein & Richland, and Marc J. Poster for Plaintiff and Appellant.

Lawrence D. Slavett for Defendants and Respondents David C. Hansen and Joan F. Hansen.

Brannan Law Offices and G. Bryan Brannan for Defendants and Respondents Michael Zacha and Malibu Business Trust.

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David Murphy appeals from a judgment entered pursuant to a motion to enforce a settlement agreement under Code of Civil Procedure section 664.6.[1] Murphy contends that the settlement agreement is unenforceable because material terms are uncertain and there was no mutual consent to the agreement as construed by the court. We disagree and affirm the judgment.

FACTUAL SUMMARY

1. *Background: The Underlying Litigation and the Mediated Settlement*[2]

In 2000, Murphy purchased from David and Joan Hansen two adjacent landlocked lots commonly described as 161 and 171 Westlake Boulevard, or Lot 161 and Lot 171, respectively. Murphy partially financed the purchase with a promissory note for $360,000 in favor of the Hansens and secured by a deed of trust on the lots. (*Murphy v. Hansen* (Aug. 27, 2009, B206751, p. 2) [nonpub. opn.] (*Murphy I*).)

The deeds from the Hansens to Murphy purported to grant Murphy an easement for "ingress, egress, roadway, drainage, sewer, public utilities and incidental purposes" across the two parcels that separated lots 161 and 171 from Westlake Boulevard. Elise Nilsen owns one of those intervening parcels; Michael Zacha and the Malibu Business Trust (collectively, "MBT") own the other. (*Murphy I*, *supra*, at p. 2.)

Disputes arose among Murphy, the Hansens, MBT, and Nilsen concerning the existence of the purported easement. In 2003, Murphy filed suit against the Hansens, alleging fraud, breach of contract, and related claims. Among other allegations, Murphy claimed that MBT had never consented to the creation of the easement. MBT then sued Nilsen, the Hansens, and others, seeking to extinguish the purported easement over MBT's property. The Hansens cross-complained against Murphy for foreclosure of the trust deed, alleging that Murphy had stopped making payments on the note.

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[1] All subsequent statutory references are to the Code of Civil Procedure unless otherwise indicated.

[2] The facts in this part are excerpted from this court's earlier decision in *Murphy v. Hansen* (Aug. 27, 2009, B206751) [nonpub. opn.].)

In July 2005, Murphy, the Hansens, MBT, and Murphy's title insurer, Chicago Title Insurance Company, participated in a mediation. Nilsen did not participate. The mediation resulted in a "memo of understanding" (MOU) signed by Murphy, the Hansens, and MBT purporting to settle the then-pending lawsuits. (*Murphy I, supra,* at p. 3.)

The MOU provides that "[t]he parties agree to execute a more formal settlement agreement consistent with the terms set forth herein." But the MOU also purports to be independently enforceable even in the absence of such a later agreement because it provides that the parties agree "that this case is fully settled and that the following terms and conditions will be enforceable by the entry of judgment on failure to comply with the terms and conditions herein[.]" (Block capitals omitted.) (*Murphy I, supra,* at pp. 3-4.) The MOU further states that it is an integrated agreement.

The MOU called for an escrow to be opened for an exchange of performances by the parties and Chicago Title. Pursuant to the MOU, (1) MBT would pay $100,000 into escrow; (2) Chicago Title would pay $90,000 into escrow; (3) the Hansens would forgive $80,000 of the unpaid principal on the promissory note, reducing the then-outstanding principal from $160,000 to $80,000, and would also forgive "all outstanding interest on [their] promissory note on or before the 15th day of August, 2005, which is the date of the close of escrow"; (4) the Hansens would, before the close of escrow, "execute and deliver to escrow a reconveyance of the deed of trust held on the 161 and 171 properties and the cancellation of the . . . promissory note"; (5) upon close of escrow, $80,000 of the contributed funds would be paid to the Hansens, and the remainder of the contributed funds would be paid to Murphy; and (6) MBT would acquire title to lot 171 "free and clear of all liens and encumbrances." (*Murphy I, supra,* at p. 4.) Thus, under the agreement Murphy would remain the owner of lot 161 and MBT would become the owner of lot 171.

Paragraph 8 of the MOU provides for an easement providing access to lot 171 from Westlake Boulevard. (Lot 161 lies between lot 171 and Westlake Boulevard.) Under Paragraph 8, MBT "shall be given a non-exclusive[] easement as necessary, over

the existing fire road, if practicable, of sufficient width to meet the fire code requirements for a residence . . . . This easement shall be adequate to meet all applicable fire code requirements and government ordinances and regulations relating to roadways." Murphy "agree[d] to execute all documents necessary to grant this easement to MBT." The easement created by paragraph 8 is sometimes referred to as the MBT Access Easement.

Paragraph 10 of the MOU provides that "MBT will execute all documents necessary to grant an easement for any and all purposes across the MBT property to Murphy for the 161 property. This easement shall be adequate to meet all applicable fire code requirements and government ordinances and regulations relating to roadways." (*Murphy I*, *supra*, at p. 4.) (MBT's original property lies between Murphy's lot 161 and Westlake Boulevard.) The easement created by paragraph 10 is sometimes referred to as the Murphy Access Easement.

The MOU further provides: "The parties are aware that this written memorandum of understanding for settlement of this case may permit the court, upon motion made pursuant to [Section] 664.6, to enter judgment pursuant to the terms of the settlement," and that the "agreement may be introduced into evidence in any subsequent proceeding to enforce its terms."

The MOU concludes: "The parties agree that they wish the Court to retain jurisdiction to enforce the terms of this agreement. To assure that the court retains jurisdiction, the parties hereby request in writing that Court retain jurisdiction, but that [the mediator] be given all adjudicative authority. In the event that [the mediator] is unable to adjudicate an[y] disputes, then the Court shall have jurisdiction. After [the mediator] has entered judgment, the Court shall enter judgment based upon his finding [*sic*] and determinations."

2. *The MOU Aftermath*

After the parties entered into the MOU, they failed to comply with its provisions. They did not execute a "more formal settlement agreement." (*Murphy I*, *supra*, at p. 5.) Chicago Title did not open escrow. MBT and Chicago Title did not contribute the specified funds. The Hansens did not reconvey the deed of trust or cancel the promissory

note. Murphy did not convey lot 171 to MBT. MBT and Murphy did not grant each other the easements described in paragraphs 8 and 10.

In May 2006, MBT moved for entry of judgment pursuant to section 664.6 on the basis of the MOU. Murphy opposed the motion, arguing inter alia that the MOU was unenforceable because the parties' "vastly different" interpretations of certain material terms show that there was no meeting of the minds. (*Murphy I*, *supra*, at p. 5.) For example, Murphy stated that MBT had taken the position that the MOU entitled MBT to a 55-foot-wide easement over Murphy's lot 161, which is "almost two and one-half times the width of the existing fire road[.]" (*Ibid.*)

On June 27, 2006, the trial court entered a minute order granting MBT's motion. The court determined that the MOU was sufficiently definite to be enforceable and directed MBT to serve and lodge a proposed order. MBT never lodged the proposed order.

More than one year later, on August 2, 2007, Murphy moved for entry of judgment on the MOU. Murphy contended that unless the court "order[ed] the parties to take specific steps to at least start the transactions called for in the judgment, . . . nothing will happen." Murphy acknowledged that "it is likely given the language and nature of the MOU that additional issues will arise," but noted that the "[c]ourt may appoint [the mediator] pursuant to the MOU as referee to determine any issues which might arise once the process has started, escrow has opened and monies are deposited."

The trial court initially ordered the parties to return to the mediator to have him decide the disputed issues concerning the content of the judgment. The mediator, however, recused himself, so the dispute returned to the court. On January 17, 2008, after an evidentiary hearing, the court entered a minute order granting the motion. Under the court's order, "[t]he proper location for the easement in favor [of MBT] is described on the As Built Grading plans comprising Exhibit 15." The easement described in that exhibit is 55 feet wide and located almost exclusively on lot 161. The court's order also states that the width of the Murphy Access Easement should be the width depicted on the "As Built Grading plans," but says nothing more about the paragraph 10 easement,

including where it should be located. (*Murphy I*, *supra*, at p. 7.) The court directed MBT to "prepare a judgment that contains all of the terms appropriate to finally resolve this dispute in accord with the MOU and the [o]rders of this [c]ourt[.]" (*Id*. at p. 8.) MBT never filed a proposed judgment.

Murphy appealed from the order granting his motion for entry of judgment.

3. *Murphy I*

On appeal, Murphy argued that the court's description of the MBT Access Easement in paragraph 8 of the MOU is inconsistent with the trial court's determination of the size and location of that easement. Alternatively, he argued that if the easement ordered by the trial court is consistent with the terms of the MOU, then the MOU is unenforceable. In an unpublished decision in 2009, we agreed with his first contention and declined to address his alternative argument. (*Murphy I*, *supra*, at pp. 8, 13.)

Regarding paragraph 8, we stated that "we do not find the language ambiguous. The easement is to be limited to the 'existing fire road,' to the extent that so limiting it is 'practicable.' And to the extent that the fire road is not located on lot 161, it is not 'necessary' (or even possible) for Murphy to grant MBT an easement to use such portions of the fire road – where the fire road is not located on Murphy's property, Murphy cannot grant MBT (or anyone else) an easement to use it. In sum, as long as it is practicable for the easement to be limited to the portions of the fire road that are located on lot 161, the easement must be so limited." (*Murphy I*, *supra*, at pp. 8-9.)

We held that the court erred because there was no evidence supporting its determination of the size and location of the easement. Although we did not address Murphy's alternative argument that the MOU was unenforceable, we indicated that the trial court's ruling that the MOU was enforceable could be revisited by the court on remand. (*Murphy I*, *supra*, at p. 13.)

4. *The Present Appeal*

Following remand, a hearing was set to determine the location and size of the easements called for in the MOU. Murphy, stating that we "effectively invited a review of the enforceability of the MOU," argued that the MOU is unenforceable. Alternatively,

Murphy argued that the MBT Access Easement should be limited to the existing 20-foot wide fire road. MBT, on the other hand, argued that the fire road is "absolutely inadequate" for the easement, and asserted that "[s]ixty feet is the normal width" granted in the area where the lots are located.

After receiving briefing and hearing argument on the enforceability question, the court ruled that the MOU is an enforceable agreement. The court thereafter heard testimony from civil engineers for Murphy and MBT, conducted an on-site inspection of the lots, and heard testimony from the Acting Deputy Chief of Prevention Services and Fire Marshal for the County of Los Angeles Fire Department. The court entered judgment in April 2014.

The judgment included language substantially identical to the language of paragraphs 8 and 10. Regarding the MBT Access Easement, the judgment included the following additional language: "[T]he MBT Access Easement shall follow the dirt road from Westlake Boulevard from East to West turning North along the boundary between Lot 161 and 171. The easement shall be twenty eight (28) feet in width over Lot 161, shall be able to support up to 80,000 pounds, the easement shall not be at more than a twenty (20) percent grade for more than 50 to 100 feet."

Regarding the Murphy Access Easement, the judgment included the following additional language: "[T]he Murphy Access Easement shall be for the purpose of accessing 161 and is defined as 28 feet onto the MBT Lot going northwesterly to the junction with Lot 151."

The judgment included legal descriptions of the easements and a schematic drawing depicting the location and size of the easements.

Finally, the court expressly retained jurisdiction to modify the easements "to make it follow the dirt road that runs between Lots 161 and 171, in the event that the owners/ developers of Lot 171 cannot obtain an approved fire access road on 171, or in the event that they acquire an interest in property north of the 171 lot and they do not have free and unfettered access to the Lot above 171 or in the event that they are unable to construct an approved emergency vehicle turnaround on all required turnouts" and "to the extent

necessary to provide legal access for 171 which is adequate, at the time of any such modification, to meet all applicable fire code requirements and government ordinances and regulations relating to roadways."

Murphy timely appealed.

DISCUSSION

1. *Judicial Estoppel*.

The Hansens and MBT contend that Murphy is judicially estopped from asserting that the MOU is unenforceable. We reject these arguments.

"'"'"Judicial estoppel precludes a party from gaining an advantage by taking one position, and then seeking a second advantage by taking an incompatible position. [Citations.] *The doctrine's dual goals are to maintain the integrity of the judicial system and to protect parties from opponents' unfair strategies*. [Citation.] . . .'" [Citation.] The doctrine applies when "(1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake." [Citations.]' [Citations.]" (*People v. Castillo* (2010) 49 Cal.4th 145, 155.) It "is *an equitable doctrine*, and its application, even where all necessary elements are present, is discretionary." (*MW Erectors, Inc. v. Niederhauser Ornamental & Metal Works Co., Inc.* (2005) 36 Cal.4th 412, 422.)

In August 2007 Murphy sought to have the court enter judgment on the MOU, taking the position that the MOU was enforceable. He now contends it is not enforceable. The two positions thus appear at first glance to be inconsistent. Under closer scrutiny, however, they are not necessarily inconsistent. When Murphy took the position the MOU was enforceable, he believed (or at least asserts he believed) that the easement he agreed to would be no wider than the 20-foot wide fire access road. It was only later that the court, in its January 2008 order, declared that the MOU called for a 55-foot wide easement. It is the MOU *so construed* that Murphy argued was not enforceable. In this light, Murphy's two positions are not inconsistent: He sought the

enforcement of an agreement as he understood it and, sought to have it declared unenforceable once it was construed differently.

Moreover, even when the elements of the judicial estoppel doctrine are established, it is a discretionary doctrine that we may decline to apply. The exercise of such discretion is appropriate here for two reasons. First, we do not perceive that Murphy's argument is an attempt to game the adversarial system or deceive the courts. (*Ferraro v. Camarlinghi* (2008) 161 Cal.App.4th 509, 558.) Second, in *Murphy I*, we expressly declined to address Murphy's argument that the MOU, if construed as calling for a 55-foot wide easement, was unenforceable and indicated that the argument could be raised on remand. Murphy merely did what we said he could do. We will therefore address the merits of his arguments.

2. *Uncertainty and Enforceability of the MOU*

Murphy contends that the settlement agreement is unenforceable because material terms are not reasonably certain and there was no meeting of the minds with respect to the MBT Access Easement. We disagree.

Section 664.6 provides that "if parties to pending litigation stipulate, in a writing signed by the parties outside the presence of the court or orally before the court, for settlement of the case, or part thereof, the court, upon motion, may enter judgment pursuant to the terms of the settlement. If requested by the parties, the court may retain jurisdiction over the parties to enforce the settlement until performance in full of the terms of the settlement." A motion for judgment under section 664.6 is appropriate "even when issues relating to the binding nature or terms of the settlement are in dispute, because, in ruling upon the motion, the trial court is empowered to resolve these disputed issues and ultimately determine whether the parties reached a binding mutual accord as to the material terms." (*In re Marriage of Assemi* (1994) 7 Cal.4th 896, 905.) In resolving such issues, the court acts as a trier of fact and "may receive evidence, determine disputed facts, and enter the terms of a settlement agreement as a judgment." (*Weddington Productions, Inc. v. Flick* (1998) 60 Cal.App.4th 793, 810 (*Weddington*).)

Although a court hearing a section 664.6 motion may determine "what terms *the parties themselves* have previously agreed upon," it does not authorize a court "to *create* the material terms of a settlement." (*Weddington, supra,* 60 Cal.App.4th at p. 810.) If the parties fail to agree on a material term or if a material term is not reasonably certain, a settlement agreement, like any other contract, is unenforceable. (*Lindsay v. Lewandowski* (2006) 139 Cal.App.4th 1618, 1622.) For contract terms to be reasonably certain, they must "'"provide a basis for determining the existence of a breach and for giving an appropriate remedy."' [Citation] If, by contrast, a supposed 'contract' does not provide a basis for determining what obligations the parties have agreed to, and hence does not make possible a determination of whether those agreed obligations have been breached, there is no contract." (*Weddington, supra,* 60 Cal.App.4th at p. 811.)

A material term that is uncertain on the face of a written agreement is not fatal to the contract if the parties provided a "'means or key'" to making the obligation certain. (See, e.g., *Beverage v. Canton Placer Mining Co.* (1955) 43 Cal.2d 769, 774; *Alameda Belt Line v. City of Alameda* (2003) 113 Cal.App.4th 15, 23; see also Civ. Code, § 3538 ["That is certain which can be made certain"].) The parties may, for example, agree to leave material terms unresolved at the time the agreement is made and allow them to be determined by a third party, such as an arbitrator or court. (See *Lindsay v. Lewandowski, supra,* 139 Cal.App.4th at p. 1623; *Weddington, supra,* 60 Cal.App.4th at p. 801; see also Corbin on Contracts (rev. ed. 1993) § 4.4, p. 583 ["It is sufficient if the agreement provides that the price shall be the amount that arbitrators or that X, a specific third person shall fix as a fair price"].)

The determination of whether a purported contract is fatally uncertain is a legal question we consider de novo. (*Patel v. Liebermensch* (2008) 45 Cal.4th 344, 348, fn. 1.) In making this determination, we are guided by the policy that "the law favors carrying out the parties' intentions through the enforcement of contracts and disfavors holding them unenforceable because of uncertainty. [Citations] 'The defense of uncertainty has validity only when the uncertainty or incompleteness of the contract prevents the court

from knowing what to enforce.' [Citation.]" (*Okun v. Morton* (1988) 203 Cal.App.3d 805, 817.)

Turning to the MOU in this case, it is clear that the parties to the MOU intended the MOU to be a binding and enforceable contract. The document was the result of a mediation session attended by the parties and their counsel, and is signed by each party and attorney. The MOU began with the recital that the parties and their counsel stipulate and agree that the pending lawsuits between them are "FULLY SETTLED AND THAT THE FOLLOWING TERMS AND CONDITIONS WILL BE ENFORCEABLE BY THE ENTRY OF JUDGMENT ON FAILURE TO COMPLY WITH THE TERMS AND CONDITIONS HEREIN . . . ." Although the parties agreed to execute a more formal agreement (which they failed to do), they also stated that they "are aware that this written memorandum of understanding for settlement of this case may permit the court, upon motion made pursuant [to Section] 664.6, to enter judgment pursuant to the terms of the settlement," and that the "agreement may be introduced into evidence in any subsequent proceeding to enforce its terms." The document included an integration clause, stating that "[t]his is the sole agreement between the parties." Finally, the parties expressly "agree[d] that they wish the Court to retain jurisdiction to enforce the terms of this agreement."

The parties' intent to enter into a binding contract does not necessarily mean they succeeded; regardless of their intent to be bound, if the court cannot determine the existence of a breach and an appropriate remedy, no contract has been formed. (*Weddington, supra,* 60 Cal.App.4th at p. 811.) Because of the parties' clear intent to enter into an agreement, however, courts "should not frustrate their intention if it is possible to reach a fair and just result, even though this requires a choice among conflicting meanings and the filling of some gaps that the parties have left.' [Citation.]" (*Okun v. Morton, supra,* 203 Cal.App.3d at p. 817.)

According to Murphy, "the most dramatic proof of the MOU's fatal uncertainty" is paragraph 8, concerning the MBT Access Easement. That paragraph, as we stated in *Murphy I*, provides for an easement, "as necessary, over the existing fire road, if

practicable, of sufficient width to meet the fire code requirements for a residence all the way from Westlake Blvd[.] until the northernmost boundaries of [lot 171]." (*Murphy I*, *supra*, pp. 8-9.) As Murphy points out, far from describing a precise location and size of the MBT Access Easement, the provision raises several interpretation issues, including: "[W]hat did 'as necessary' mean? [And] [w]hat did 'if practicable' mean?" Murphy also argues that there was no meeting of the minds as to the easement because he understood paragraph 8 to create an easement limited to the "existing fire road," which is about 20 feet wide, while MBT envisioned a 55-foot or 60-foot easement. In addition, Murphy points to other ambiguities and uncertainties in the MOU pertaining to the Murphy Access Easement and a provision that allows MBT to drill for water on Murphy's lot 161. Although the parties left these and other questions unresolved, they did provide a "means or key" to determining these issues, namely the "adjudicative authority" of the mediator or the court.

In particular, the parties not only requested the court retain jurisdiction to enforce the terms of the settlement, but that the mediator "be given all adjudicative authority" and, if the mediator "is unable to adjudicate an[y] disputes, then the Court shall have jurisdiction." By this language, the parties provided for a third party—the mediator or the court—to decide *any* issues that may arise. The questions Murphy poses, such as the meaning of "as necessary" and "if practicable," and the disputes concerning the width and location of the easements can thus be resolved by that third party. In this manner, any uncertainty in the MOU can be "made certain." (Civ. Code, § 3538.)

Although the parties gave the mediator and court the power to resolve any issues that arise, the trial court's power to decide such issues is not unlimited. The court's construction of the MOU is still subject to our review and its factual findings reviewable for substantial evidence. As our decision in *Murphy I*, makes clear, if the trial court's decision is not supported by substantial evidence, it will be reversed. (*Murphy I*, *supra*, at p. 10.) In this appeal, however, Murphy does not contend that the trial court's decision fails this test. His focus is exclusively on the threshold issue of the MOU's enforceability. Because we reject his arguments on that point, we affirm the judgment.

DISPOSITION

The judgment is affirmed. MBT and the Hansens shall recover their costs on appeal.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

CHANEY, J.

JOHNSON, J.